# NO. 84-608

## In the Supreme Court of the United States

OCTOBER TERM, 1984

WESTINGHOUSE ELECTRIC CORPORATION, et al.,

Petitioners

versus

S/S LESLIE LYKES, her engines, etc., *in rem,* and LYKES BROS. STEAMSHIP CO., INC.,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

**Opposition of Respondent Lykes Bros., Steamship Co., Inc., to the Petition of Westinghouse Electric Corporation, et al., for WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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19

## COUNTER-STATEMENT OF QUESTIONS FOR REVIEW

I

In a suit to recover cargo loss or damage resulting from a fire aboard an ocean carrier, do not the statutes (the Fire Statute, 46 U.S.C. Sec. 182, and the Carriage of Goods by Sea Act, 1936, Secs. 1304(2)(b) and 1308), and the decisions of this Court, as well as the uniform decisions, with one questionable exception, of the lower courts, mandate that cargo prove that the loss or damage was caused by the "design or neglect" of the owner, and the "actual fault or privity" of the carrier?

II

Whether the Fire Statute, expressly preserved by the Carriage of Goods by Sea Act, 1936 (46 U.S.C. Sec. 1308), is in any way subject to Sec. 1304(1) of the Act, but rather is not entirely independent thereof, so that the condition precedent of due diligence does not apply to fire?

III

Whether the Fifth Circuit's careful analysis of the cause of the fire is not correct, and whether its conclusion that the cause of the fire was neither "design or neglect" or "actual fault or privity", should not be sustained.

IV

Will this Court disturb the concurrent findings of fact of the two lower courts that the procedures in the effort to extinguish the fire were those decided and executed

under the direction of the master of the vessel, on the scene, and not under the "supervision and approval" of the home office or the port engineer present aboard the vessel; and thus not within the "design or neglect" or "actual fault or privity" of the carrier?

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**STATUTES CITED** **PAGE**



**OTHER AUTHORITY CITED**

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## STATUTORY PROVISIONS INVOLVED

FIRE STATUTE (46 U.S.C. ¶182):

> No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever which shall be shipped, taken in, or put on board any such vessel, by reason or by

means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.

UNITED STATES CARRIAGE OF GOODS BY SEA ACT, 1936

**Rights and Immunities—Sec. 4**

46 U.S.C. ¶1304

(1) Neither the carrier nor the ship shall be liable for damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other, parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph (1) of Section 3. Whenever loss or damage has resulted from unseaworthiness, the burden or proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—..

(b) Fire, unless caused by the actual fault or privity of the carrier.

**Responsibilities and Liabilities—Sec. 3.**

46 U.S.C. ¶1303

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are shipped, fit and safe for their reception, carriage and preservation.

46 U.S.C. ¶1308

Sec. 8. The provisions of this Act shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916, 39 Stat. 728, 46 U.S. Code 801, or under the provisions of sections 4281 to 4289, inclusive, of the Revised Statutes of the United States; 46 U.S. Code 181-189, or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels.

(N.B.,R.S. 4282, 46 U.S.C. 182, is the Fire Statute)

## STATEMENT OF THE CASE

At the commencement of the voyage involved, the LESLIE LYKES was in all respects seaworthy in design, gear, hull, machinery, and equipment, currently certified by the Coast Guard and by the American Bureau of Shipping.

After calls at various gulf ports, she took departure from Charleston for her Atlantic crossing August 27, 1976. On August 29, 30, 31st, the vessel encountered heavy weather in the vicinity of Hurricane Emmy.

On August 31, at 2315, the mate on the bridge detected the noise of a possible cargo movement, and on the morning of September 1st, a clanking sound was heard in the No. 3 hold, not from No. 4 as had originally been thought. At 1212 the smoke detector alarm buzzer sounded on the bridge, confirming fire in No. 3 lower tween deck.

Fire fighting commenced at once and continued aboard the ship, and apparently succeeded, as she made her way to her destination, El Ferrol, Spain, arriving September 6, where she was boarded by port officials, officers of the Spanish navy fire fighting school, the local fire brigade, and Mr. Castro, Lykes' port engineer, who had come from New Orleans to meet her.

A rectangular hole was drilled into the No. 3 lower tween deck from No. 4 to probe the source of the fire, and was temporarily covered. September 8 to reach the No. 3 lower tween deck, the No. 3 weather deck was opened, and then the pontoon covers of the No. 3 lower tween deck were rolled back. A flash-over occurred; heat was conducted through the bulkheads, aft to No. 4 and forward to No. 2, igniting bagged flour in each. All three holds had to be flooded and the fire was finally extinguished. Cargo in the three holds was damaged, some by fire, some by water in the efforts to extinguish, some by both.

Because of their extraordinary valor, reflecting the highest proficiency of the Merchant Marine, both at sea and El Ferrol, the officers and the crew of the LESLIE LYKES were cited with commendations in a public ceremony.

Access to the No. 3 lower tween deck was blocked with the stowage of flour in No. 3 upper tween deck and it

is really on this one point that petitioner has sought to build its entire case. The argument that the blocked manhole was the proximate cause of the fire is a complete non sequitur, not supported by any effective evidence. So too, as the Fifth Circuit has made plain in its review of the crucial question of causation, 734 F.2d at 205, 212, et seq. the fire was not *caused* by the blocked manhole.

On this record it does not appear necessary to repeat here the efforts to probe the source of the fire and the efforts to make sure it was extinguished. The two courts below have held that these efforts were the actual decisions of the master of the vessel, and were not dictated by the home office of the owners; and thus they were not and could not be within the owner's "neglect" or "actual fault or privity."

## SUMMARY OF ARGUMENT

### Reasons Why the Case Should Not be Reviewed by This Court

1.

The holding in the present case correctly applied principles of the leading case of this Court, *Earle & Stoddart v. Ellerman's Wilson Line,* 287 U.S. 420 (1932) (per Justice Brandeis), which has been the authority, unvaryingly followed on all pertinent points, until the Ninth Circuit's aberration in *Sunkist Growers, Inc., v. Adelaide Shipping Lines,* 603 F.2d 1327 (1979), *cert. den.,* 444 U.S. 1012. *Earle & Stoddart* categorically answered petitioner's whole contention. Petitioner failed in its absolutely fundamental burden to prove that the fire was caused by the "design or neglect" or "actual fault or privity" of the

respondent, as mandated by the statutes by decision of this Court, and by the unanimous holding of all lower courts which have considered the question.

ii.

The Fifth Circuit correctly held that the blocking of the manhole to No. 3 lower tween deck by bags of flour was not the cause of ignition in the cotton stow in No. 3 lower hold; and this decisive point ought not to be disturbed.

iii.

The Ninth Circuit's *Sunkist*, is, on its facts inapposite, in that the owner/carrier there was clearly guilty of "neglect" and of "actual fault or privity"; and as to its wide-ranging *obiter dictum*, is contrary to the statutes and to the decisions of this Court. In the context of the present case it need not be considered at all as creating any actual conflict between the circuits.

iv.

As to the alleged conflict between the Second and Fifth Circuits, the exact opposite is true, the decision in the present case is in accord, in every pertinent particular, with Second Circuit's *Eurypylus*, 677 F.2d 225 (1982).

v.

As to the attack by cargo petitioner on the fire fighting efforts at the end of the voyage, both the trial court and the Fifth Circuit found as fact that those efforts to extinguish were made, on the scene, under the orders of the master of the ship, and were not attributable to the

respondent. These concurrent findings of fact are within the "two-court" rule.

## I

## ARGUMENT

The Congressional intent to insulate shipowners from liability for fire "unless caused by the design or neglect", or "unless caused by the actual fault or privity" of the owner, could not be stated in plainer language; and the burden of proving that precondition of liability is, by the same explicitly plain language, placed squarely on the cargo seeking to recover.

The vital burden has been an essential part of the interpretation placed upon the statutes by every court which has ever considered them. As a representative sampling see *Walker v. Transportation Co.*, 3 Wall (70 U.S.) 150 (1865), (negligence of officers and crew); *Earle & Stoddart, Inc., et al. v. Ellerman's Wilson Line, Ltd.*, 287 U.S. 420 (1932), (gross negligence of chief engineer in putting new bunker coal on top of old, which was known to be heating and thus creating a pre-voyage unseaworthy condition, discoverable by due diligence); *Consumers Import Co. v. Kabushiki Kaisha Kawasaki, et al.*, 320 U.S. 249 (1943), (negligent stowage of fish meal, making ship unseaworthy); *The Older*, 65 F.2d 359 (2nd Cir., 1933), (negligent repairs); *Hoskyn & Co., Inc. v. Silverline, Ltd.*, 143 F.2d 462 (2nd Cir. 1944), (cause of fire not proved); *The Ocean Liberty*, 199 F.2d 134 (4th Cir., 1952), *cert. den.*, 345 U.S. 992, (alleged negligent stowage); *Automobile Insurance Co., et al. v. United Fruit Company*, 224 F.2d 72 (2nd Cir., 1955), *cert. den.*, 350 U.S. 884, (alleged negligent stowage); *Fidelity-Phenix Fire Ins. Co., et als. v. Flota Mercante del Estado*,

205 F.2d 886 (5th Cir., 1953), *cert. den.*, 346 U.S. 915; *Alfa Romeo, Inc. v. S/S Torinita*, 499 F.Supp. 1272 (SDNY, 1980), (alleged negligent stowage and fire fighting), where the court also observed, at 1282: "Of particular significance is the fact that the purpose of the Fire Statute exemption is to sever the insurance aspect of a contract of carriage from the transport aspect. In this case, it is appropriate that the cargo underwriters be obligated to cover the risk that they contracted to undertake"; and *Container Schiffs, et als. v. Corporation of Lloyd's, et als.*, 1981 AMC 60 (SDNY, 1981, not otherwise reported), (alleged unseaworthiness and negligent fire fighting).

In every one of these decisions, though there was pre-voyage negligence or pre-voyage unseaworthiness, the shipowner was statutorily exonerated.

The princpal thesis of petitioner in efforts to deny respondent the protection of the exemptive statutes is the mistaken notion that the right to that protection is somehow conditioned upon or connected with the shipowner's non-delegable duties in other contexts. This is an old, timeworn argument of cargo, advanced early in its efforts to thwart the explicit exemption given the carrier by law.

It had long since been exploded.

For instance, the Harter Act, 46 U.S.C. 190, *et seq.*, (1893), imposed on the shipowner the duty to "exercise due diligence to make the vessel in all respects seaworthy", in order to qualify for exemption from liability for certain kinds of cargo damage. The Harter Act, like COGSA, also provided, Sec. 195, that this "shall not be held to modify or repeal sections 4281, 4282, and 4283 of the Revised Statutes...", Section 4282 being the Fire Statute.

Notwithstanding the saving provision of Sec. 195, cargo underwriters, as here, were quick to contend that the due diligence predicate of certain of the Harter Act exemptions applied equally to the Fire Statute exemption. In *Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd., supra,* the cargo put forward the forerunner of the precise argument made by cargo here. It was squarely rejected by this Court. The Court made clear that the exemption was *not* predicated upon the Harter Act's requirement to "exercise" due diligence to make the said vessel in all respects seaworthy...", and also made clear that the carrier is exonerated for fire even in a case of "unseaworthiness existing at the commencement of the voyage and discoverable by the exercise of ordinary care."

The court said at p. 425:

> "The Courts have been careful not to thwart the fire statute by interpreting as 'neglect' of the owners the breach of what in other connections is held to be a non-delegable buty."

It is probably not without significance that *Earle* does not appear in petitioner's brief.

The foregoing mandate was again Congressionally stated when the Carriage of Goods by Sea Act of 1936 replaced the Harter Act in ocean-going commerce, 46 U.S.C. Sec. 1300, *et seq.,* and granted exemption (Sec. 1304(2)(b) from liability for "fire, unless caused by the actual fault or privity of the carrier." Even more so, the Fire Statute once again was left untouched, see Sec. 1308.

Again, perhaps not without significance, this section is not mentioned in petitioner's brief.

This arrangement is a plain quid pro quo, as stated by this Court in *Consumers Import Co., v. K.K.K. Zosenjo*, 329 U.S. 249, at 255 (1943), where the petitioner's present arguments were again rejected:

> While it does not often come to the surface of the record in admiralty proceedings, we are not unaware that in commercial practice the shipper who buys carriage from the shipowner, buys fire protection from an insurance company, thus obtaining in two contracts what once might have been embodied in one. The purpose of the statute to relieve carriage rates of the insurance burden would be largely defeated if we were to adopt an interpretation which would enable cargo claimants and their subrogees to shift to the ship the risk of which Congress relieved the owner. This would restore the insurance burden at least in large part to the cost of carriage and hamper the competitive opportunity it was purposed to foster by putting our law on an equal basis with that of England.

This purpose remains as valid today as it was when the fire exemption was granted by Congress in the Fire Statute and reiterated by Congress in the Carriage of Goods by Sea Act, and efforts by subrogated cargo underwriters, as here, to vitiate the Congressional purpose ought not to be permitted to succeed.

The burden of proving "design or neglect" and "actual fault or privity" remains on petitioner, and has not been carried here.

The attack of petitioner has no legal basis whatsoever except such as may be found in *Sunkist, supra.* In it, cargo here seeks to find a conflict between the Ninth and

Fifth Circuits. An examination of the facts of *Sunkist* will quickly show that there there were very serious defects in the ship herself, which were actually known to the owner's high managerial representatives, and that that series of deficienceis was sufficient to fix "neglect" or "actual fault or privity" on the owner. Those facts were decisive of the case and the court need have gone no farther. Instead, in what can fairly be called *obiter dictum*, the Ninth Circuit embarked upon a completely unnecessary repudiation of all the existing law. Again, with respect, that extensive digression makes the case an aberration which, on those points, has been sharply criticized, not only in the instant case, but in the Second Circuit's *Eurypylus*, 677 F.2d 225 (2nd Cir. 1982); and *Lloyds Marine & Commercial Law Quarterly*, p. 1, Feb., 1982.

The actual facts in *Sunkist* would have made the carrier liable, without the necessity of the court's excursion into an effort to rewrite the law. The claimed conflict of the circuits actually thus can be seen to be more apparent than real.

Another interesting feature of *Sunkist* is that it relies quite heavily on British cases decided under Canadian law (603 F.2d at 1337). The Ninth Circuit's opinion does not mention the fact that Canada has no fire statute (Tetley, *Marine Cargo Claims*, 2d Ed., p. 189; Healy and Sharpe, *Admiralty*, 1974, p. 538, footnote 75); nor does petitioner's brief.

For all of these reasons it is suggested that *Sunkist* does not warrant review of the present case as creating a conflict between circuits.

The alleged conflict between the Second and Fifth Circuits on the weight to be given to what petitioner chooses to call "circumstantial evidence" but which is

"sketchy circumstantial evidence" or "pure speculation" is not accurately stated and on examination will be found not to exist.

Both courts below agreed that the master, although listening to advice from Spanish port officials, the Spanish naval fire fighting school officials, and shore-based Lykes employees, retained and exercised actual, ultimate control over the fire fighting efforts on his ship. The tactical decisions of the master were not attributable to the owner. In this connection it seems sufficient to refer to what is popularly called the "two court rule", reflected in this court's repeated pronouncement that it cannot undertake to review concurrent findings of fact by two courts below in the absence of very obvious and exceptional showing of error, *Berenyi v. Immigration Service,* 385 U.S. 630 (1967). None of that exists here.

## CONCLUSION

Accordingly it is submitted that the writ should be denied.

Respectfully,

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